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In the matter of:

Digital Performance Right in
Sound Recording and Ephemeral
Recording

Docket No.
2000-9

CARP DTRA
1 & 2

CARP Hearing Room
LM-414
Library of Congress
Madison Building
101 Independence Ave, SE
Washington, D.C.

Wednesday
September 12, 2001

The above-entitled matter came on for hearing,
pursuant to notice, at 9:00 a.m.

BEFORE

THE HONORABLE ERIC E. VAN LOON	Chairman
THE HONORABLE JEFFREY S. GULIN	Arbitrator
THE HONORABLE CURTIS E. von KANN	Arbitrator

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WASHINGTON, D.C. 20005-3701

ORIGINAL

APPEARANCES:

On Behalf of Clear Channel Communications, Inc.,
National Religious Broadcasters Music License
Committee, and Salem Communications Corporation

KARYN ABLIN, ESQ.
BRUCE G. JOSEPH, ESQ.
THOMAS W. KIRBY, ESQ.
DINEEN PASHOUKOS WASYLIK, ESQ.

of: Wiley, Rein & Fielding
1776 K Street, N.W.
Washington, D.C. 20006
(202) 719-4913
(202) 719-7000

On Behalf of American Federation of Television
and Radio Artists

ARTHUR J. LEVINE, ESQ.
of: Finnegan, Henderson, Farabow,
Garrett & Dunner, LLP
1300 I Street, N.W.
Washington, D.C. 20005-3315
(202) 408-4032

On Behalf of the Association for Independent
Music

JACQUES M. RIMOKH, ESQ.
BARRY I. SLOTNIK, ESQ.
of: Loeb & Loeb, LLP
345 Park Avenue
New York, New York 10154-0037
(212) 407-4900

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WASHINGTON, D.C. 20005-3701

APPEARANCES: (Cont'd)

On Behalf of BET.com; CBS Broadcasting, Inc.; Comedy Central; Coollink Broadcast Network; Echo Networks, Inc.; Everstream, Inc.; Incanta, Inc.; Launch Media, Inc.; Listen.com; Live365.com; MTVi Group, LLC; MusicMatch, Inc.; MyPlay, Inc.; NetRadio Corporation; Radioactive Media Partners, Inc.; RadioWave.com, Inc.; Entercom Communications Corporation; Spinner Networks, Inc.; Susquehanna Radio Corp.; Univision Online; Westwind Media.com, Inc.; and Xact Radio Network, LLC

ADAM I. COHEN, ESQ.

MARK A. JACOBY, ESQ.

R. BRUCE RICH, ESQ.

FIONA SCHAEFFER, ESQ.

KENNETH L. STEINTHAL, ESQ.

of: Weil, Gotshal & Manges, LLP
767 Fifth Avenue
New York, New York 10153
(212) 310-8622

On Behalf of AEI Music Network; DMX Music, Inc.

SANDRA M. AISTARS, ESQ.

DAVID R. BERZ, ESQ.

of: Weil, Gotshal & Manges, LLP
1615 L Street, N.W., Suite 700
Washington, D.C. 20036
(202) 682-7272

On Behalf of the Recording Industry Association of America, Inc.

JOHN A. FREEDMAN, ESQ.

ROBERT ALAN GARRETT, ESQ.

HADRIAN R. KATZ, ESQ.

BRAD R. NEWBERG, ESQ.

RONALD A. SCHECHTER, ESQ.

JULE L. SIGALL, ESQ.

CHRISTOPHER WINTERS, ESQ.

MICHELE J. WOODS, ESQ.

of: Arnold & Porter
555 Twelfth Street, N.W.
Washington, D.C. 20004
(202) 942-5719

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WASHINGTON, D.C. 20005-3701

APPEARANCES: (Cont'd)

On Behalf of Public Radio:

DENISE LEARY, ESQ.
of: Public Radio, Inc.
635 Massachusetts Avenue, N.W.
Washington, D.C. 20001
(202) 513-2049

On Behalf of American Federation of Musicians of
the United States and Canada:

PATRICIA POLACH, ESQ.
of: Bredhoff & Kaiser, P.L.L.C.
805 15th Street, N.W.
Suite 1000
Washington, D.C. 20005
(202) 842-2600

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C-O-N-T-E-N-T-S

WITNESS

DIRECT CROSS REDIRECT RECROSS

Steven Marks

By Mr. Steinthal

9543

EXHIBIT NO.

DESCRIPTION

MARK RECD

RIAA

None.

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1 P-R-O-C-E-E-D-I-N-G-S

2 MR. GARRETT: Well, let me just say, if
3 we're going to ask about those specifics -- and I
4 think the answer to the last question, too, are things
5 that really need to be in restriction session here.

6 MR. STEINTHAL: I would oppose that for
7 the following reason. We're not talking about any
8 specific licensee's deal. Their position in this case
9 as to what the fees that they're seeking is public.
10 And I don't see why general questions about the
11 strategy across the licensee body that was followed
12 would fall under the restricted record.

13 ARBITRATOR GULIN: Because if he answers
14 the question he's giving away what the license fees
15 are; is that correct? Isn't that restricted?

16 MR. STEINTHAL: Well, is it restricted,
17 Your Honor, that there are deals that were done in a
18 given range collectively without identifying what
19 licensee did what deal? I would say the answer to
20 that is no.

21 MR. GARRETT: Well, I would say the answer
22 to that is yes here. And our position from the outset

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1 has been consistent here; that if we're going to be
2 talking about the rates and terms that are in those
3 agreements -- whether you want to identify specific
4 agreements or you want to give an assessment of where
5 they all are -- that that is something that we
6 consider to be confidential and not part of the public
7 record here.

8 I don't ask his witnesses to reveal even
9 general ranges that their deals are in. And I think
10 we've protected the confidentiality of any kind of
11 rate or term that they had even on a collective basis,
12 and I think we should be accorded the same courtesy as
13 well.

14 ARBITRATOR VON KANN: Is there any great
15 prejudice to you by taking this in restricted session?

16 MR. STEINTHAL: I can't say there's great
17 prejudice, Your Honor.

18 ARBITRATOR VON KANN: Okay.

19 CHAIRMAN VAN LOON: In that case, we'll go
20 into restricted closed session at this point. I ask
21 anyone here who's not appropriate to step out and put
22 the sign on the outside of the door.

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1 MR. GARRETT: Mr. Chairman, I would also
2 request that the record reflect that we went into
3 restricted session with his answer to the proceeding
4 question, where the witness said that all of their
5 deals had a 15 percent rate added.

6 CHAIRMAN VAN LOON: John, can you do that
7 for the previous answer? Thank you.

8 BY MR. STEINTHAL:

9 Q Let me try to reframe it since it's been
10 a while since I asked the question. I think what I
11 asked, and what I will ask now, is as follows.

12 Is it true that when you were negotiating
13 per-performance rates with prospective licensees, that
14 putting aside situations where it was an alternative
15 minimum fee, like you talked about this morning, and
16 putting aside Yahoo, which we'll spend a lot of time
17 on later, isn't it true that the rates that you told
18 licensees you'd be willing to do, and ultimately did,
19 always ended up by the end of the term at, at least,
20 .35 cents per performance or above?

21 A Yeah. I mean, when we started the process
22 we were at rates that were higher, so we didn't go

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1 into the market with that .35-.4 rate in 1999. But
2 certainly once that rate began to develop in the
3 market, that's what -- I would agree with your
4 statement.

5 Q And isn't it true that you did go into the
6 market with the .4 cents rate as something you had in
7 mind from a negotiating committee as something that
8 would be a result that was acceptable to you?

9 A We thought the rate initially should be
10 higher than that, but that's where we ended up very
11 quickly.

12 Q Okay. Not that it matters to anybody here
13 physically in the room, but I think we can go back on
14 the public record.

15 CHAIRMAN VAN LOON: Let's go back on the
16 public record and remove the sign from the door
17 outside.

18 (Whereupon, at 11:53 a.m., the proceedings
19 went into Open Session.)
20
21
22

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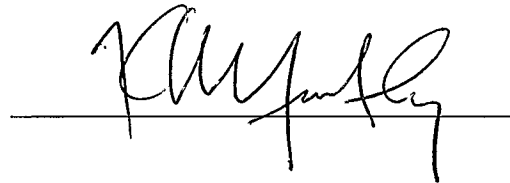
This is to certify that the foregoing transcript in
the matter of: Hearing: Digital Performance Right
 in Sound Recording and Ephemeral
 Recording,
 Docket No. 2000-9 CARP DTRA 1 & 2

Before: Library of Congress
 Copyright Arbitration Royalty Panel

Date: September 12, 2001

Place: Washington, DC

represents the full and complete proceedings of the
aforementioned matter, as reported and reduced to
typewriting.



1 BY MR. STEINTHAL:

2 Q Mr. Marks, is it fair to say that many of
3 the 26 licensees that entered into licenses with the
4 RIAA were unsophisticated in terms of their knowledge
5 and experience of music licensing?

6 A I wouldn't agree with that.

7 Q You wouldn't?

8 A No.

9 Q Well, is it fair to say that most of them
10 are unsophisticated from a business standpoint?

11 A I think they all understood what made
12 sense for their business, so I wouldn't agree with
13 that either.

14 ARBITRATOR VON KANN: Can I have follow up
15 to the question a minute ago? And this was in
16 restricted, so I don't want to recite the specific
17 figure. But I think you said in answering this time,
18 Phil, that initially you started out these
19 negotiations trying to get a higher per-performance
20 figure than you have requested here, and fairly
21 quickly had to drop down to the level that is part of
22 your proposal; is that right?

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1 THE WITNESS: That's correct.

2 ARBITRATOR VON KANN: And you had to drop
3 down to that because the people you were negotiating
4 with said that's it; we won't pay more than that,
5 sorry? Why did that happen?

6 THE WITNESS: That's basically right. We
7 didn't make any progress in the negotiations in which
8 we attempted to get that higher rate.

9 ARBITRATOR VON KANN: So you put those
10 figures out there, and people in effect said no way;
11 if that's the deal we're out of here or something?

12 THE WITNESS: Yeah. They said that we
13 won't agree to a deal at that rate.

14 ARBITRATOR VON KANN: Okay.

15 BY MR. STEINTHAL:

16 Q Can you tell me one licensee that said no
17 way on that per-performance rate?

18 A I'm just trying to go back and -- there
19 were people with whom we didn't reach agreement, that
20 we dropped down to the .4, and we ended up not doing
21 the agreement for other reasons.

22 Q This may be hard to do.

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1 A Let me just think chronologically.

2 Cablemusic rejected our per-performance
3 rate, as in our initial discussion. We -- our
4 discussions with them went, gross revenues/operating
5 expenses to per-performance, and then back to gross
6 revenues to the capital amount. And that was because
7 they thought that the per-performance rate might be
8 too high, and they wanted to go to a post-revenue
9 deal.

10 iJockey, we initially requested rates that
11 were higher than the rates that were in that
12 agreement. And that may be the only one that I can
13 recall at this point.

14 ARBITRATOR GULIN: Excuse us.

15 CHAIRMAN VAN LOON: Thank you. Please
16 continue.

17 BY MR. STEINTHAL:

18 Q Well, in response to Judge Von Kann, you
19 said that there were licensees that said, no way. And
20 that's what led you to drop from your initial demand
21 on per performance to the level that you ultimately
22 adopted as the per-performance rate. And then in

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1 response to the more recent questions, you identified
2 two licensees. You didn't quite use the words "no
3 way." For example, with Cablemusic you said that they
4 thought about it, and they thought they'd rather have
5 the percentage of revenue than the per-performance
6 rate, correct?

7 A Yes.

8 Q So are you basically saying that the
9 Cablemusic said, upon reflection they would prefer a
10 percentage-of-revenue approach to a per-performance
11 approach? Or did they actually say, hey, that number
12 you gave me on per performance is way too high?

13 A I would have to go back and look at the
14 correspondence. I mean, it was all part of a
15 negotiation. We proposed a per-performance rate.
16 They rejected that rate as part of the negotiation,
17 and we moved on to a different type of model.

18 Q So you're not sitting here saying that
19 they said "no way", or words of that syllable, in the
20 negotiation process on a per-performance number, are
21 you?

22 A I wasn't parsing Judge Von Kann's words

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1 that -- you know, thinly. I was answering did they
2 agree to it or did they not agree to it.

3 Q Okay. Same true of the iJockey situation?

4 A iJockey was a little bit different. We
5 proposed rates that were higher, I believe. And then
6 they said no to those rates, and we ended up somewhere
7 in the middle.

8 Q Okay. And we'll come back to that. And
9 if we're on the public record I won't go any further
10 on that at this point.

11 Now, I believe you testified on your
12 direct that there was a lot of back and forth on a lot
13 of different terms in your license negotiations with
14 the licensees, correct?

15 A Yes.

16 Q And you suggested that that was true with
17 respect to not only economic issues but issues such as
18 data, security, public service announcements and the
19 like. Is that your testimony?

20 A Yes, on many occasions.

21 Q That's what I wanted to ask you.

22 Isn't it true, Mr. Marks, that on many --

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1 at least 40 or 50 percent of your licensee
2 negotiations -- the licensees basically just took as
3 is the standard terms and conditions in the RIAA
4 license covering data, reporting, security, et cetera?

5 A I don't think 40 to 50 percent is right.

6 Q Well, let's try to back it out then.

7 Certainly you would agree with me that in
8 some circumstances the licensee just basically was
9 concerned about what the minimum fee was and whether
10 they were going to take a per-performance or a
11 percentage-of-revenue rate; isn't that right?

12 A That's -- yeah, that's a different
13 question than the last one. I wouldn't -- no, I
14 wouldn't agree with that. The fact that we may have
15 sent a draft after having business discussions -- or
16 discussions over business terms -- and that after
17 agreeing to those additional terms -- the additional
18 consideration as we've termed it -- I mean, it was on
19 every term sheet that we sent. So I think it was
20 certainly part of the negotiation process about
21 whether X rate with X terms was acceptable to them.

22 Q Maybe you misunderstood my question.

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1 Putting aside negotiation over fee and
2 negotiation over whether it's going to be a
3 per-performance fee, percentage-of-revenue fee and
4 what the minimum fee might be -- putting that to the
5 side -- isn't it true that in many circumstances there
6 was virtually no push back by the licensee to the RIAA
7 on the other terms and conditions in the RIAA form
8 license?

9 A There were certainly some cases where they
10 accepted those terms upon us offering them or asking
11 for them, yes.

12 Q And isn't it true that in a substantial
13 number of the 25 or 26 licensees that was the case?

14 A I don't think that's right. I mean, those
15 -- we discussed those in -- it's very difficult to
16 quantify given all the material. But if I were
17 sitting here trying to think of a way to quantify it,
18 I would say most negotiations, those were things that
19 we discussed at some level or another.

20 Q Isn't it true that it was basically only
21 the larger more experienced companies that went back
22 and forth with you on terms and conditions other than

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1 the economic terms?

2 A I think that in most of our negotiations
3 we had either discussions or exchanges of drafts where
4 those were an issue. I mean, in most instances, when
5 we put that on the term sheet, the webcaster's
6 response was, "Well, where does that come from?" I
7 mean, they wanted to know why we were including it.
8 And we explained that we felt that that was part of
9 the consideration; the rate would have been a
10 different rate if that consideration wasn't there. I
11 mean that's what happened in the multi-task
12 technologies agreement. They said, under no
13 circumstances are we going to agree to certain of the
14 data provisions. And we said, that's fine; we're open
15 to doing that if you pay something additional. And
16 that's what they agreed to do.

17 Q Well, again, we're going to come back to
18 the specific arrangements. So your testimony is,
19 then, that in most circumstances there was back and
20 forth on all the terms and conditions, including the
21 non-financial terms and conditions. Is that your
22 testimony?

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1 A I don't think that's what I said. I mean,
2 you were asking me specifically about those additional
3 consideration items. And my testimony would be that
4 on many occasions we had discussions that may have
5 been over-the-phone discussions or actual exchanging
6 of drafts to change language in some of those
7 provisions.

8 Q Well, there's a difference, isn't there,
9 between somebody saying what does this mean, okay, in
10 terms of getting an understanding of what a clause is,
11 and somebody actually negotiating with you to change
12 terms and conditions? You'd agree with me there's a
13 difference between those situations, right?

14 A Yes.

15 Q Okay. Now, I just want to be clear I have
16 your answer then.

17 Is your answer that in most of the times
18 people actually negotiated changes of those
19 non-economic terms and conditions?

20 A I -- I think the answer to that would be
21 no; that they didn't negotiate changes, but they were
22 certainly part of the discussions that we had about

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1 the consideration for kind of the business deal. And
2 in some instances they requested changes as it related
3 to the business deal, and in some instances they
4 requested changes with regard to the language.

5 Q It's fair to say, thought, isn't it, that
6 in the vast majority of circumstances, after you
7 explained that those non-economic terms and conditions
8 were part of the consideration from your perspective,
9 the RIAA basically said, those are our standard terms
10 and conditions, and people just accepted them, right?

11 A Again, the only reason I'm having some
12 discomfort with this because you're trying to put me
13 in their minds as to what they agreed to or not and
14 what their thinking was. And all I'm saying is it was
15 part of the negotiation. Some of the items we
16 dropped. I mean, we initially went out into the
17 market with what we achieved in MMM of getting the
18 links to the copyright owner sites. That was
19 rejected, and we dropped it, from even asking for it.

20 So in some instances, certainly, things
21 were rejected, and they didn't become part of the
22 deal. In other instances they accepted as part of the

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1 overall business deal.

2 Q I'm not trying to be difficult. I wasn't
3 asking about what was in their mind. I was asking you
4 whether after explaining that certain non-financial
5 terms and conditions were what they were -- and in the
6 RIAA's mind they were part of the consideration. My
7 question was, isn't it true that in most circumstances
8 with your licensees, the reality is that those
9 non-economic terms and conditions were taken
10 essentially as is from the RIAA's form?

11 MR. GARRETT: I'll object. It's asked and
12 answered.

13 ARBITRATOR GULIN: Yeah, he certainly
14 answered that. Your next question was -- I think you
15 used the term "the vast majority," that you went from
16 most to vast majority. So I've already got the answer
17 to the first one. Why don't we stick with "vast
18 majority," which I don't know if he's going to be able
19 to quantify or not. You may want to use numbers
20 rather than those kinds of terms, but it's up to you.

21 MR. STEINTHAL: Well, we're going to come
22 back and go through the agreements, so we'll just do

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1 it that way. I'll just withdraw the question.

2 Now, I know you testified that you didn't
3 think that you licensees were unsophisticated, but let
4 me ask you this question.

5 Is it your view that the actions of the
6 companies with whom you did license agreements can
7 fairly be use as a benchmark for companies that have
8 multiples more in terms of music use, revenues, and
9 costs than the group of licensees with whom you did
10 agreements, excluding only Music Match and Yahoo?

11 THE WITNESS: I think we believe that the
12 deals we've done are representative of the marketplace
13 that is the statutory license or that is the group of
14 companies that are using the statutory license. And
15 that, therefore, those rates should apply as the
16 statutory license rate.

17 BY MR. STEINTHAL:

18 Q Is it irrelevant to you in giving that testimony
19 that some of the companies that haven't done licenses
20 with you have very different economic circumstances
21 than the circumstances of the licensees with whom
22 you've done deals? Again, putting aside Yahoo and

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1 Music Match for the moment.

2 MR. GARRETT: Can I just ask counsel to
3 explain what he means by different economic
4 circumstances here?

5 MR. STEINTHAL: Multiples more in revenues
6 and costs of their business operations. How's that?

7 THE WITNESS: I think the basic business
8 is essentially the same. I mean, there are certainly
9 economies of scale that apply to, for example,
10 bandwidth costs and things like that. But -- I mean,
11 we genuinely feel that the deals we've done are
12 representative of the market.

13 BY MR. STEINTHAL:

14 Q And I just want to be really clear here.
15 Is it your view that if you do deals with a handful of
16 companies that have revenues of, say, a million
17 dollars or less a year and music use of X, that those
18 deals can fairly be used as a benchmark for companies
19 that have hundreds of millions of dollars in revenues
20 and have hundreds more times of music performances.

21 MR. GARRETT: Just so that I'm clear, are
22 we talking hundreds of millions of dollars of revenues

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1 from the DMCA webcasting service or is this for their
2 entire business?

3 MR. STEINTHAL: For their entire business.

4 THE WITNESS: The only thing that -- we've
5 always looked at it as what is the business of
6 providing the DMCA-compliant music. And there are
7 certain economics to that business, certain inputs to
8 that business, certain prices that go along with those
9 inputs. And those may change a little bit from
10 company to company if one company, as I said, is able
11 to achieve an economy of scale for bandwidth costs or
12 something like that. But the business is essentially
13 the same. And many of the companies we did deals with
14 had business plans that were similar in terms of what
15 they hoped to achieve. And the deals that we did with
16 them were based on those ultimate business plans.

17 BY MR. STEINTHAL:

18 Q So if I have your answer right, it doesn't
19 matter that a company makes hundreds of millions of
20 dollars overall. Your focus for similarity purposes
21 here is on how much money they were making from their
22 webcasting operation, right?

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1 A That was the focus of -- in our
2 negotiations, yes.

3 Q And your testimony is, in answering my
4 question about the comparability of those companies,
5 irrespective of their overall sizes, is you should
6 focus on the size of the webcasting operation, right?

7 A Say that again. I'm sorry.

8 Q Your testimony is that, in terms of
9 looking at the comparability of the companies, you
10 want to look at the comparability in terms of size and
11 scope of revenues and costs associated with just their
12 webcasting operations, right?

13 A I think that's most relevant, yes.

14 Q Is it your testimony that the
15 circumstances surrounding the 26 licensees that did
16 deal with the RIAA are such that they are comparable
17 to everyone else out there that has not done webcaster
18 license arrangements with the RIAA?

19 MR. GARRETT: I'm sorry. I don't want to
20 keep interrupting here. But are we using
21 comparability in terms of that the statute uses it,
22 are we talking about comparability as he understands

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1 it, or is there another definition that --

2 MR. STEINTHAL: Fine. Counsel, I'll be
3 more precise.

4 You're familiar with the fact that the
5 statute uses the word "comparable licensees" and
6 "comparable circumstances," are you not?

7 THE WITNESS: Yes.

8 BY MR. STEINTHAL:

9 Q So your testimony, that the circumstances
10 surrounding the 26 licensees with whom the RIAA did
11 deals are comparable, in the manner used by the
12 statute, to all the other broadcasters and webcasters
13 that have filed notices of their intent to avail
14 themselves in the statutory license.

15 A As a general matter, yes.

16 Q Well, as a specific matter, are there
17 entities that you would agree are not comparable to
18 the universe of licensees with whom you've done deals?

19 A There may be.

20 Q As you sit here today you can't think of
21 one, though?

22 A No.

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1 Q Now, assume for the moment that some
2 licensees of yours desired an RIAA license as a
3 stepping stone to gain entree to the labels -- the
4 RIAA member companies -- for non-statutory licenses
5 and benefits, like servicing. Assume that for a
6 moment.

7 Wouldn't you agree with me that if there's
8 a group of licensees, or prospective licensees, that
9 didn't care about that -- that didn't care about an
10 entree for non-statutory licenses -- and didn't care
11 about servicing, that there's a difference in the
12 circumstances between the first group and the second
13 group?

14 A Let me try to give you an answer that I
15 hope answers your question. And it's the best way
16 that I can answer it without feeling like I'm giving
17 an economist opinion, which I don't think I'm
18 qualified --

19 Q Yes or no might do.

20 A Well, all I know is that everyone we sat
21 down with looked very seriously at what the rates were
22 so that they could build a successful business.

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1 Whether their motivation to come to the table may have
2 been servicing or something else, I can't tell you in
3 most cases, and certainly don't feel qualified to give
4 an opinion as to yes or no, whether that's a
5 comparable circumstance from at least an economic
6 perspective.

7 Q Would you agree, though, that those with
8 the motivation of obtaining an entree for
9 non-statutory license arrangements and benefits with
10 RIAA member companies may place a value in the RIAA
11 license where others might not if they don't have the
12 same interest?

13 A Well, again, we didn't promise anything to
14 anybody. We couldn't. So if they placed a value on
15 that, I guess it's a risk that they would be taking.

16 Q Let me ask you this. Would you agree that
17 if a given licensee of the RIAA desired an RIAA
18 license because it wanted certainty as to either the
19 fee situation or its eligibility for the statutory
20 license because it was in the middle of seeking
21 funding -- and assume for the moment that the
22 potential investor said, I'm not interested unless I

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1 know for sure you qualify for the statutory license
2 and what the fee is. Assuming that set of
3 circumstances, wouldn't you agree that that universe
4 of companies is in a different set of circumstances in
5 terms of how it approaches the RIAA for a license from
6 someone that doesn't care about raising money at the
7 time?

8 MR. GARRETT: I'm going to object to the
9 question. I mean, we're not presenting the witness
10 here to testify as an economist or even to testify
11 what the meaning of circumstances are within the
12 statute here. He's here to talk about the deals that
13 he has done, and that's why he's here.

14 CHAIRMAN VAN LOON: The panel is going to
15 overrule the objection.

16 THE WITNESS: Can you repeat the question
17 for me?

18 MR. STEINTHAL: Sure.

19 THE WITNESS: Sorry.

20 BY MR. STEINTHAL:

21 Q Wouldn't you agree -- well, let me break
22 it up in two pieces.

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1 Assume for the moment that you have an
2 RIAA licensee that is seeking funding, and is told by
3 a potential investor that it's important for the
4 licensee to have certainty in terms of either his
5 eligibility for the statutory license or the fee
6 structure for the sound recording performances that
7 it's going to use. Take that as a given.

8 Wouldn't you agree that such a licensee or
9 group of licensees has different circumstances in
10 terms of its evaluation of an RIAA license from
11 entities that have no concern about raising funding or
12 eligibility issues?

13 A I think the difference is primarily in the
14 motivation to come to the table. My experience in
15 terms of actually negotiating the rates once they were
16 at the table was not, God, we really need this
17 certainty; just tell us where to sign. I mean,
18 everyone of the negotiations we had, or most of the
19 negotiations we had, went back and forth for several
20 months. And it was clear to me, at least, that they
21 were -- the licensees were giving serious thought
22 about whether the rates could work for their business.

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1 Q So you would attach no difference in
2 comparability, for purposes of this statute, between
3 entities that are under pressure to get a done deal
4 with the RIAA so that its eligibility for the license
5 and the fact of its costs are defined compared to
6 licensees that have no need to get those issues
7 resolved?

8 A Nobody we -- none of our licensees ever
9 told us or indicated that they were under pressure to
10 sign a license in order to get funding. Some of them
11 may have said that it was something that was part of
12 their thinking in sitting down and talking, but nobody
13 said that we've got to sign this license; what's the
14 rate and where do we sign.

15 Q Let me ask you a different question. You
16 testified that one of the reasons why the Negotiating
17 Committee felt that a percentage of revenue structure
18 was a good structure was because sound recordings --
19 I think your works were -- are so unique; therefore,
20 it's appropriate to become a partner, if you will, in
21 the webcasting business. Do you remember saying that?

22 A Yes.

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1 Q Now, what do you mean by they're so unique
2 in that context?

3 A Well, each recording is unique. They're
4 not like widgets. You can't substitute one for the
5 other necessarily. If you want to play a channel that
6 has music by The Beatles and artists that are like The
7 Beatles, there's only one Beatles repertoire. So
8 that's what I meant.

9 Q That plainly is a factor with respect to,
10 I would submit, an on-demand service, where you're
11 buying the opportunity to get a performance of one
12 piece of music for another piece of music, each of
13 which, in your words, is unique. But wouldn't you
14 agree that that's a different marketplace than a
15 blanket license, which entitles the user to use
16 whatever songs are in the RIAA repertoire as long as
17 it complies with the DMCA performance complement?

18 A I agree that those are two -- maybe two
19 different markets, but I don't think that bears on the
20 issue of the recordings being unique. I mean, I was
21 making the comparison as between other inputs, for
22 example, that a webcaster needs.

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1 Q Well, why don't I just ask you this before
2 we move into the restricted record and the agreement.

3 That same comment you made is equally
4 applicable, is it not -- in terms of uniqueness and in
5 terms of the need to have it for purposes of a
6 webcasting operation -- to musical works as it is
7 sound recordings?

8 A No, not entirely. That's not true.
9 Webcasters could use the musical works and do what
10 Muzak does, and just hire a band to do it. They don't
11 do that. They want the Beatles version of a
12 particular musical work.

13 Q Do you know of any webcaster sitting here
14 that is operating a service that is Muzak on air?

15 A No. And that's because they think the
16 recordings are unique. And they want The Beatles, and
17 they don't want Joe Schmo's version of Sergeant
18 Pepper's.

19 Q Well, could they perform the sound
20 recording to Sergeant Pepper's without the underlying
21 right to use the musical work?

22 A No, they can't.

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1 Q And isn't the composition part of Sergeant
2 Pepper's a unique work under the U.S. copyright law
3 compared to every other composition?

4 A Yes. I'm just saying it's not as unique
5 as the sound recordings.

6 MR. STEINTHAL: At this point we're going
7 to start getting into the licenses and some of the
8 restricted information. So we can either do that for
9 a while, and then break, or we can take our lunch
10 break now. Which ever the panel prefers.

11 CHAIRMAN VAN LOON: Well, it's close to
12 the time for the lunch break, so I think we're
13 inclined to do that, and then come back.

14 MR. STEINTHAL: When we're come back I
15 think we're going to do the --

16 CHAIRMAN VAN LOON: We'll give you the 112
17 discussion, first.

18 MR. STEINTHAL: -- the 122 issue first.

19 CHAIRMAN VAN LOON: Yes. And there's two
20 other matters that we ask you to consider over lunch.
21 One is, we've got a draft invitation letter from Mr.
22 Garrett. I'm not sure at this point whether it was

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1 yesterday or the day before, but the one going out.
2 And I think you all were going to indicate to us
3 whether you had any comments on it. We'd like to get
4 your thoughts and input.

5 There's one additional matter we'd ask you
6 to consider and consult with your colleagues on. And
7 that is, we want to consider your request that we not
8 go late this evening. And if we were to adopt that
9 course of action, could you give us a projection of
10 when you believe the cross-examination of Mr. Marks
11 might conclude.

12 I know that there's a number of different
13 parties that have questions they want to ask, but sort
14 of a sense of a feel.

15 MR. STEINTHAL: Why don't I think about it
16 over the break?

17 CHAIRMAN VAN LOON: That's what we're
18 saying, that you all think about it and confer over
19 the break. And we can talk about it after lunch.

20 Mr. Garrett?

21 MR. GARRETT: Mr. Chairman, just so that
22 we can be most responsive to you on this 112

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1 discussion, could you tell us exactly what it is that
2 you would like us to address right here? Do you want
3 us simply to answer your questions when we come back,
4 or do you expect us to actually make a presentation?
5 And if the latter, what is it you would like us to
6 specifically address?

7 CHAIRMAN VAN LOON: We were hoping each
8 side could make a brief presentation along the lines
9 that Mr. Berz had described, not elaborate or formal,
10 about 10 minutes or so. Really just outlining for us,
11 clarifying your position with regard to that, so we
12 can have it more crisp on our own minds as we go off
13 in the break period between direct and rebuttal.

14 ARBITRATOR VON KANN: Speaking for one
15 panelist only, I was hoping Mr. Berz would explain to
16 me what aspects of his client service he believes are
17 subject to the 112(e) license, and you would explain
18 to me why you think some or none of that is.

19 CHAIRMAN VAN LOON: And we were
20 anticipating offering Mr. Berz the opportunity to go
21 first.

22 ARBITRATOR GULIN: And speaking for this

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1 panelist, at this point I have some confusion as to
2 what we're setting a rate for with respect to these
3 services, and that's what I want to be clear on. And
4 then, of course, Mr. Garrett --

5 CHAIRMAN VAN LOON: As for me, I have no
6 questions. I just want them to --

7 Let's come back, then, at 1:30

8 MR. GARRETT: I just want to make clear.
9 I know that I can't consult with Mr. Marks about his
10 testimony. But is there any objection to my
11 consulting with him about the Section 112(e) matter
12 that is going to be discussed at 1:30?

13 CHAIRMAN VAN LOON: I would think that
14 that's appropriate. He hasn't gone into that or been
15 cross-examined on that.

16 MR. GARRETT: Okay.

17 (Whereupon, a lunch recess was taken at
18 12:30 p.m., and the matter reconvened at
19 1:31 p.m.)

20 CHAIRMAN VAN LOON: I think we're on the
21 record, then, and we're ready to hear from the
22 parties' guidance and help and explanation on the 112

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1 issue.

2 MR. BERZ: Chairman Van Loon, my intention
3 this afternoon is to briefly, but I hope in a
4 straightforward way, put a circle around what it is we
5 think is at issue in this proceeding for our clients
6 in the background music industry. And I think I'd
7 like to start with what it is that we think you are
8 tasked with and we are asking you to set a rate for.
9 And then, perhaps, talk a little bit about the
10 justification of this, and, of course, answer your
11 questions consistent without getting into an
12 attenuated legal or oral argument.

13 Essentially, we think this proceeding,
14 particularly now that the direct case is in, is really
15 about those ephemeral copies -- those buffer and cache
16 copies that Doug Talley, and to a lesser extent, but
17 Barry Knittel, referred to that are generated in the
18 course of the delivery of the DBS satellite broadcast
19 business for these two companies.

20 As I say, now that we have a sense of the
21 industry's case, let me tell you what we don't think
22 is in and why.

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1 We don't think the home premise, hard
2 copy, if you will, piece of our business is in this
3 proceeding. And the reason we don't think it's in
4 this case is we have comprehensive agreements, as we
5 put into the record and described in our briefing, in
6 our exhibits, that cover, from our point of view --
7 and I hope the industries -- all of the rights we need
8 to deliver that unpremised product. So that's what
9 we're about in this proceeding, given the facts and
10 the evidence that's in to date.

11 Beyond that, it's our view that we've got
12 to look, if you will, at the other end of the statute.
13 And what we're talking about here is a performance
14 right, if you will. And, of course, we don't have
15 that obligation; we have an exemption. And we view
16 all of these ephemeral copies -- these buffer and
17 cache copies -- as essentially incidental to the
18 performance as it relates generally to all of these
19 technologies, but particularly, for purposes of this
20 proceeding, to the DBS satellite broadcast businesses
21 that we've described and set forth in our briefs and
22 in the testimony.

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1 ARBITRATOR VON KANN: So you think it's
2 only with respect to the portions of the business that
3 involve the use of satellites?

4 MR. BERZ: Correct. Because as I said, we
5 believe we have comprehensive agreements that already
6 deal with all aspects of our unpremised businesses.

7 CHAIRMAN VAN LOON: And just to clarify on
8 that, there was testimony about some of the economic
9 arrangements already in place. And so the ephemeral
10 rate that you proposed would be added on to that as
11 opposed to substitute it for that.

12 MR. BERZ: Yes. But, of course, our plea
13 to the panel, our prayer for relief, is zero. We did
14 put in our pleading that if the panel felt compelled
15 that it had to issue a rate, we put in a \$25,000
16 figure. But I want to make clear that at the end of
17 the day, that amount represents the high side based on
18 a variety of different kinds of experiences that
19 aren't necessarily tied to this DBS satellite program;
20 to come up with a number that's the maximum that the
21 clients feel they'd be willing to put forward. And,
22 again, it was predicated on the notion that the panel

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1 may feel compelled.

2 So the answer to your question is yes, but
3 X plus zero renders X. But that's our primary
4 purpose.

5 ARBITRATOR VON KANN: I thought Mr.
6 Knittel said the rationale for zero was that existing
7 agreements would already give us all the rights we
8 need to operate all aspects of our service. You're
9 now saying not so with respect to satellites.

10 MR. BERZ: No, I'm really not. What I'm
11 saying is that with respect to on premise, we have
12 comprehensive agreements that we can cover our entire
13 business. That's not necessarily the case with
14 respect to the DBS satellite and broadcast business.

15 You may recall that AEI has one agreement
16 at a 6 percent rate that covers all rights as well,
17 but it's tied to the satellite business. But that's
18 the only one that AEI and DMX have. And so, given
19 what this CARP is about and given the gap, and given
20 our inability, quite frankly -- and this is not
21 intended in any way to be disparaging. As you can
22 imagine, we've had discussions about trying to resolve

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1 this. Mr. Garrett and I have talked about it; the
2 clients talked about it before then. We've just been
3 unable to come to an agreement, and that's why we're
4 participating in this compulsory licensing proceeding.

5 ARBITRATOR GULIN: Let me ask you this.
6 You have full rights. You don't need any of the
7 rights with respect to -- you don't need any other
8 licenses with respect to your on premises model.
9 However, you feel you don't have all the rights you
10 need with your respect to your models that involve
11 satellites.

12 Why would it not be appropriate to look at
13 the agreements that cover on premises, for which you
14 have the entire rights, as a benchmark to figure out
15 what you should pay for that portion of the satellite
16 model that you don't have rights for?

17 MR. BERZ: Well, I think subject to the
18 way we would brief that issue, that may, in fact, be
19 one benchmark. As you may recall from the testimony
20 we were in a little bit of a dilemma there because as
21 we I think demonstrated -- just to refresh your
22 recollection or I hope we demonstrated, and we asked

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1 some questions about this -- the licensing agreements
2 that we have, they're not broken into specific
3 components describing a certain percentage of the
4 percentage that's paid for a particular right or
5 activity that's required to generate our product.

6 But, if you will, without conceding how
7 that issue might get briefed, as well as the potential
8 for bringing in other relationships outside of the
9 business establishment, we understand the underlying
10 sort of issues here about a willing buyer and a
11 willing seller. And we're not uncomfortable with you
12 looking at those agreements. And, indeed, that's why
13 we talked about them in the testimony and worked with
14 them in front of the panel.

15 MR. RICH: If I could just supplement this
16 slightly, Judge Gulin.

17 Mr. Berz indicated --

18 CHAIRMAN VAN LOON: Let me ask you to keep
19 your voice up, too, Mr. Rich, because the people in
20 the back --

21 MR. RICH: Fair enough, since I've been
22 complaining my fair share about that.

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1 CHAIRMAN VAN LOON: Very much interested
2 in your comments.

3 ARBITRATOR VON KANN: Mr. Steinthal is
4 hanging on every word back there.

5 MR. RICH: Mr. Berz indicated there is a
6 very limited scope of ephemeral rights which are being
7 sought to be established by the panel. And I want to
8 emphasize that this is a different statement than the
9 suggestion that the potential scope of ephemeral
10 rights that would be available, theoretically, to the
11 background music industry is limited to buffer and
12 cache copies. We do not so urge. We say that given
13 the totality of the relationship, including the
14 existence of one or more other agreements, the sole
15 piece of the puzzle, if you will, that we seek and
16 need a license for at this point, and that otherwise
17 qualifies, as we read the statute and its
18 requirements, for an ephemeral are these buffer and
19 cache copies.

20 Now, when you look at the underlying
21 agreements to which you refer, they're vastly
22 different. They weren't fundamentally entered into

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1 for the need for buffer and cache copies. They were
2 fundamentally entered into because databases were
3 created not meeting the requirements of the ephemeral
4 license at all; among other reasons, for the six-month
5 factor, among other reasons if you were to subscribe
6 to the RIAA position. Because they may not entail
7 transmissions to begin with of which the ephemeral is
8 a part.

9 In other words, it's an apples to oranges
10 comparison of the nature of rights. So that it's very
11 difficult from our perspective to extract out or
12 theorize what a little piece of the rights -- namely,
13 what a buffer and cache part of that broader grant of
14 rights, applicable to different business models, would
15 suggest as to the value here of something, which the
16 copyright office in its 104 report says, isolating
17 precisely this form of activity, buffer and cache
18 copies, has little economic value in and of itself and
19 separated from the underlying performance.

20 And so while it's appropriate for you to
21 give whatever weight you desire to those other
22 agreements in your own judgment, needless to say,

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1 there's very little there, it seems to us, of
2 substance that sheds light on what the value for this
3 little, teeny, tiny piece of just buffer and cache --
4 transient copies -- in aid of an exempt public
5 performance, statutorily exempt, is really worth.

6 ARBITRATOR VON KANN: Okay.

7 What's wrong with that?

8 MR. GARRETT: How much time do you have?

9 ARBITRATOR VON KANN: Not a lot.

10 MR. GARRETT: Let me start where I think
11 we agree.

12 We agreed that the 112(e) statutory
13 license does not apply to their on-premises business.
14 And that includes a profusion in access service that
15 they offer, which is a server-based service. We don't
16 believe that 112(e) applies to that on-premises
17 business at all.

18 CHAIRMAN VAN LOON: Which two did you
19 mention, Mr. Garrett?

20 MR. GARRETT: The access and the
21 profusion, which are the server-based services that
22 they have.

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1 Now, just so that there's also nothing
2 unclear here, we believe that's the case because they
3 do not meet -- other background music services do not
4 meet the statutory conditions for the 112(e) statutory
5 license with regard to their on-premises services. To
6 the extent that Mr. Berz suggested that, well, we've
7 got all the licenses we've need because we've
8 negotiated those with the other record labels, that
9 may or may not be true. But regardless of whether or
10 not they have that agreements with the other record
11 labels, the fact is they do not meet the statutory
12 conditions; and therefore, cannot take advantage of
13 the 112(e) statutory license for their on-premises
14 services.

15 I think we also agree that 112(e) does
16 apply, or that they can qualify for the 112(e)
17 statutory license with respect to their DBS or
18 broadcast service-- one that makes use of the
19 satellite technology here.

20 Again, we have some concerns as to whether
21 or not, in the specific case of AEI and DMX, they
22 actually meet all of the conditions of the statutory

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1 license, whether they could actually qualify. But as
2 a general matter we think that that's what the 112(e)
3 statutory license was intended to get at-- making
4 those ephemeral copies that would support this DBS
5 satellite transmission.

6 As to the significance of the agreement,
7 in response to Judge Gulin's questions, the bottom
8 line is that our companies have relationships with the
9 services like AEI and DMX going back for two or three
10 decades. And during that period they have, in fact,
11 negotiated a number of agreements that set royalty
12 rates for making of copies that were necessary in
13 order to support something that was ultimately an
14 exempt performance on those sound recordings. But
15 they have been entering those kinds of deals for a
16 number of years, and we have presented you with those
17 deals as well as testimony concerning those. And we
18 think that they do provide an appropriate benchmark
19 for setting the 112(e) statutory license.

20 And Mr. Rich refers to this as a teeny,
21 tiny, little piece. The fact of the matter is that
22 that broadcast service cannot take place without these

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1 ephemeral copies being made, just like their
2 on-premises business cannot take place without them
3 making hard copies, physical copies of different CDs
4 here.

5 And so from our perspective, the value
6 that the parties have in numerous negotiations over
7 the years accorded to copies in the on-premises model
8 is a very good benchmark for the royalty that should
9 be set here for the ephemeral copies. They're
10 essential if they are going to engage in this DBS
11 business service.

12 The bottom line is they found a better way
13 to provide the service, a technologically and more
14 efficient way of providing the service than they had
15 before. But the value of the copies that are
16 necessary to make that service remains the same,
17 regardless of which business model they decide to
18 pursue here. We think those agreements are generally
19 -- and the evidence will show that those agreements
20 are generally in the range of 10 to 15 percent.

21 Now Mr. Berz has referred to an agreement
22 that has a 6 percent royalty in it. And that was an

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1 agreement that Warner and AEI entered into, and about
2 which we also had testimony. And as that testimony
3 shows, Warner was willing to enter into that agreement
4 because at the time there was uncertainty as to
5 whether or not we had any rights at all, whether
6 Warner or other record companies had any rights at all
7 to secure any type of compensation.

8 They knew they couldn't get compensation
9 for the performances, which is true, even the
10 on-premises model. But there was also concern as to
11 whether or not -- an uncertainty as to whether or not
12 those ephemeral copies that were being made to support
13 the DBS service were copies within the meaning of the
14 statute. That deal was entered into before the DMCA.

15 MR. BERZ: I apologize, Bob, for
16 interrupting.

17 If we want to get into sort of an argument
18 about the agreements, and how they were negotiated,
19 and what underlied them -- I'm only concerned about
20 that only because we could talk about each of the
21 agreements, and there's underlying testimony for each
22 of them.

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1 I wanted to make the point with Arbitrator
2 Gulin, simply that in response to his question, yes,
3 there will be arguments about how those agreements
4 should be considered. And we would agree that the
5 agreements are entered in differing amounts. There is
6 a 15 percent, there are 10's, and there are the 6.
7 But I think the time to talk about the applicability,
8 if you will, of any or all of these agreements is in
9 the course of briefing of these issues based on the
10 record.

11 I think the key here, as I said -- I hope
12 -- is to leave you with a sense of the ring around
13 what it is we're trying to have you set a rate for.
14 I admit that the role is not a simple one. But what
15 we don't agree with -- and we briefed this issue to
16 the office, at least on the procedural issue, with
17 think a favorable result -- was that this is not a
18 proceeding in which we're going to establish a series
19 of legal declaratory judgment, scope of the statute,
20 necessarily, decisions. At the same time, you need a
21 context for that.

22 CHAIRMAN VAN LOON: We would like to hear,

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1 at least, the remainder of Mr. Garrett's point. He
2 listened without interrupting when you all presented.
3 And I think we all understand we don't want to get
4 involved in the ins and outs of a bunch of individual
5 agreements. And I'd ask him to continue with --

6 MR. GARRETT: There's little additional.
7 But I wanted to make clear that as I walked in here,
8 I also did not intend to get into the ins and outs of
9 the agreements and how you should value them. But the
10 point was made on the other side that there was a 6
11 percent rate here. And I think it's important to
12 understand the context of that 6 percent rate, and
13 also how it relates to the 10 to 15 percent rates that
14 otherwise have been negotiated.

15 But I agree with Mr. Berz that now is not
16 the time to be making that argument, and that's what
17 we will argue to you at the conclusion of the
18 proceeding.

19 I believe there is agreement here that all
20 the parties are asking you to in this proceeding here
21 is it focus on the broadcast model, and determine the
22 royalty that should apply to that broadcast model for

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1 making the ephemeral copies. And that you should not
2 be setting royalty rates here for the on-premises
3 services, whether it's the Pro Pak or the Pro CD or
4 the profusion and access models.

5 ARBITRATOR GULIN: It sounds like we've
6 got agreement on that. And we'll make that clear in
7 your rebuttal and your proposed final rate that that's
8 what we're talking about.

9 MR. BERZ: That's what we're talking
10 about.

11 ARBITRATOR VON KANN: You apparently do
12 have agreements, and that makes me nervous.

13 CHAIRMAN VAN LOON: No, no, it makes us
14 happy.

15 ARBITRATOR VON KANN: Well, except, I
16 don't understand the rationale that you've both given
17 for it. So I need to sort of make sure I'm up to
18 speed with you, which I don't think I am.

19 There have been, apparently, over the
20 years a series of agreements with these services. I
21 have not gone back and read them all. Many of them
22 preceded the digital age I suspect. You established,

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1 I thought clearly, that in every aspect of this
2 service ephemeral copies are made, lots and lots of
3 them at many different stages. I doubt that these
4 agreements say, this covers every aspect of your
5 operations except broadcast over satellite; that's
6 excluded. I don't know.

7 So I'm still trying to understand what you
8 both, apparently, understand, which is why it's real
9 clear that it's only that chunk that's not covered by
10 the existing agreements.

11 MR. GARRETT: Well, I think, Your Honor,
12 it's not just enough that "ephemeral" copies are made.
13 These are copies that have to be made for purposes of
14 facilitating a digital audio transmission. And in the
15 case of on-premises services I don't believe you have
16 that requirement. There are additional requirements
17 that the 112(e) statutory license impose, such that
18 the copy may actually be made by the transmitting
19 organization as opposed to the business establishment
20 service.

21 Furthermore, let me just go back. We're
22 talking about copies that are made and support of

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1 transmissions that are exempt under a specific
2 provision in Section 114. And that exemption applies
3 to digital audio transmissions that are made to a
4 business establishment.

5 So, for example, if copies might be made
6 by the business establishment itself, that's not
7 something that is coming within this statutory
8 licensing. And that's what keeps out a lot of these
9 additional copies that we're talking about.

10 Now, likewise, as Judge Gulin had asked
11 the question, well, every time we play a CD an
12 ephemeral copy is being made, sure. But that's not
13 something that is being used to facilitate a digital
14 audio transmission and a public performance to a
15 business establishment. So that's basically it.

16 But with the broadcast service we do have
17 the ability -- because you're shooting it up there to
18 the satellite. You're taking a copy and shooting it
19 up there to the satellite. And it's very much like
20 the case with the webcaster who makes a copy and puts
21 it on a server, which is then transmitted to the
22 consumer.

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1 ARBITRATOR VON KANN: I don't know that
2 this will make a difference, and I have to go back and
3 look at the testimony. But I think that even in the
4 broadcast model the record is that there are
5 ephemerals made not just in connection with shooting
6 it up to the satellite and back, but at earlier stages
7 going into the server, as I recall, and going here and
8 going there.

9 Is it in your view, only the ephemerals in
10 connection with shooting up and back to the satellite
11 or is it all ephemerals made in the course of the
12 broadcast satellite model of business?

13 MR. GARRETT: I think that, for example,
14 in the DBS broadcast service where that diagram was
15 showed how they put it into this digital repository,
16 and then they put it into the player, cache here.
17 Now, that could technically qualify.

18 The problem we have with the way they do
19 it is that, the things that are in this digital
20 repository are also used to support their on-premises
21 services. And we think that's what takes them out of
22 the statutory license. But as a technical matter

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1 there's more than one copy there.

2 ARBITRATOR VON KANN: But I'm still not
3 sure what the answer is.

4 Is our rate only concerned with the
5 ephemerals that involve shooting things up and back to
6 the satellite, or other ephemerals made along the way
7 in the course of operating that broadcast model?

8 MR. GARRETT: I think it would be the
9 latter, Your Honor. Again, provided they all come
10 within the statutory licensing conditions. For
11 example, they're destroyed within six months of the
12 time that the public performance is made.

13 ARBITRATOR VON KANN: I think we are, in
14 essence, setting a rate for a license that would
15 permit them to make any and all ephemerals that are
16 needed to operate the broadcast, satellite DBS model.

17 MR. GARRETT: I think that's right. And
18 one of the issues here is how many copies. And I
19 think neither side here has taken a position that it
20 ought to be just two copies or three. I think
21 whatever number of copies are necessary to run this
22 service. And the other licenses that we've had over

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1 the years allowed them to make the copies that are
2 necessary to run that type of service, and I'm saying
3 the same thing here.

4 ARBITRATOR VON KANN: Do you agree with
5 that?

6 MR. BERZ: Not quite, but I think it sort
7 of raises the issue here. I actually think that given
8 the record in this case, we're really looking at the
9 rate for, let's call them the post-server copy
10 ephemerals that are created to get that music up and
11 out to the business establishment. And I say that
12 because that's what the record sort of -- that's the
13 record that we have in place.

14 Now, I agree -- and again, working off of
15 the example that I think Mr. Tally gave to Arbitrator
16 Gulin -- the minute you put your CD into your own
17 machine, you're starting to generate ephemerals, there
18 are ephemerals. But we've got issues in this record
19 as to what qualifies for the ephemeral. And people
20 could disagree about that. And I'm concerned, given
21 the record, that we don't really want to spend a whole
22 lot of time briefing a theoretical issue. That's

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1 really what I think is critical here-- a theoretical
2 issue. We want to take this record. We want you to
3 establish a rate going back two years, going forward
4 a year, and that's what we're looking for.

5 This technology moves. This technology
6 changes. There will be an opportunity -- if somehow
7 the technology does change -- and by the way, I want
8 to make it clear that today I'm not suggesting that it
9 will. There's no CONUS here. But if, for example,
10 the breadth of what's ephemeral changes because our
11 technology somehow changes in two years or three years
12 or four years, there's an ample opportunity for the
13 industry to raise those issues and deal with the whole
14 question of what's ephemeral and what isn't.

15 And, quite frankly, what we'd like to do
16 is simplify the task before you draw this ring, and
17 let you know that we put into our briefs our various
18 business model for a reason, which was to give you a
19 sense of our whole business, put it in context, and
20 also deal with the fact that we already have
21 agreements in our businesses and certain other
22 respects with the labels.

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1 ARBITRATOR GULIN: I think Mr. Garrett
2 didn't disagree with that.

3 MR. BERZ: I just wanted to point out that
4 if we go back to far as to when the first ephemeral is
5 created, from our point of view, and I think Mr.
6 Garrett's, we may lose sight of what the target is
7 here.

8 MR. RICH: While we are in agreement that
9 we are not pursuing ephemerals as to on premise, we do
10 not subscribe to Mr. Garrett's rationale for why.
11 That might be the RIAA's rationale; that there is no
12 legal entitlement to ephemerals. Our position,
13 rather, is that those are issues dealt with adequately
14 by existing contractual arrangements. If, in fact,
15 there is a disagreement, I'll report to the panel
16 happily, that won't be your issue, that will be an
17 issue between the parties after the closure of this
18 proceeding and after you establish a rate. But we
19 don't buy into the premise that there are lots of
20 technical parsings of 112(e) that necessarily as a
21 theoretical matter disqualified on-premise delivery or
22 aspects of it from ephemeral coverage. It simply is

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1 it being our client's view that there is no need for
2 that economic protection as part of this proceeding,
3 from this panel, that it is covered elsewhere. We'd
4 soon or not pay twice for it.

5 ARBITRATOR GULIN: You're not saying that
6 you reserve the right at some future point -- or are
7 you saying that you reserve the right at some future
8 point to claim that the statutory rate that we set
9 would apply to that long term?

10 MR. RICH: We're claiming that as of
11 January 1, 2003, it's conceivable for another CARP or
12 another negotiation. This is without prejudice, is
13 our argument. And we would hope the panel's ruling
14 would be so stipulated. That is, as to the
15 theoretical coverage in the theoretical world of what
16 the ephemeral may touch, we don't see that as
17 something necessarily that needs to be reached by the
18 panel beyond what is now a zone of agreement, I think,
19 as to what is encompassed for rate-setting purposes
20 here, the only area that is encompassed. The great
21 unwashed of what might in another world, either with
22 existing technology or future technology also be

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1 encompassed, we might disagree about. But since
2 neither of us is putting that body of activity before
3 this panel, we see no reason for you to hassle with
4 it, try to resolve it. And in any event, as I read
5 the copyright office, I don't think it's your charge
6 to resolve the legal questions to the extent they
7 exist.

8 ARBITRATOR VON KANN: Mr. Garrett, do you
9 agree that we are only concerned with the post-server
10 ephemerals? I thought, frankly, I detected a little
11 difference from you on that.

12 MR. GARRETT: No. I thought it would
13 cover the server ephemerals as well.

14 ARBITRATOR VON KANN: That's what I
15 thought I heard.

16 CHAIRMAN VAN LOON: You're going to need
17 speak louder again. You're not able to be heard in
18 the back.

19 ARBITRATOR GULIN: Sorry. But that
20 doesn't have any effect on the rate we're setting here
21 today, does it?

22 ARBITRATOR VON KANN: It might, if you

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1 ascribe a lot of value to that stage of the process.

2 MR. GARRETT: Our position -- and I
3 understand that the panel did not want us to get to
4 arguing the rates here. But I mean, our position is
5 that these copies are what are necessary in order to
6 engage in the type of business that they want to
7 engage in. And it's the same type of business they've
8 been engaging in in the past, except that they're
9 using a different technology. So that is really our
10 position.

11 But I think where we are agreed here is
12 that all we're asking the panel to do here is to set
13 a rate for ephemeral copies that are made in
14 connection with the broadcast service here. And I
15 think I do disagree with Mr. Rich here about whether
16 there are other types of service that they offer that
17 qualify for ephemeral licenses.

18 CHAIRMAN VAN LOON: We had anticipated
19 when we asked you to speak about this briefly and
20 informally that there would continue to be
21 disagreement and not all be settled.

22 ARBITRATOR VON KANN: I have a sense of

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1 the general area of agreement, and this little point
2 about whether it's only the post-server, may or may
3 not make any difference to us at all. But as you go
4 down in your briefing, if you think it does, then you
5 need to address that a little bit. And for the
6 moment, I'll put that on the background. That may be
7 an issue we'll never have to deal with.

8 MR. GARRETT: I understand.

9 MR. BERZ: Thank you for the opportunity.
10 I hope we've answered your questions.

11 CHAIRMAN VAN LOON: Thank you very much
12 for helping to answer a lot of them and to clarify
13 some of them. And I think it's appropriate at this
14 time, then, to invite Mr. Marks to resume the same
15 stand, and invite Mr. Steinthal to resume the cross.

16 MR. JACOBY: Mr. Chairman, if I might make
17 one other housekeeping matter?

18 CHAIRMAN VAN LOON: Yes, please, Mr.
19 Jacoby.

20 MR. JACOBY: The panel, you would recall,
21 had requested of Mr. Fine, if he could provide the
22 panel with the album purchased data -- demographic

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1 data -- this album purchasing data. He agreed to
2 provide it. I have furnished it to Mr. Garrett.

3 CHAIRMAN VAN LOON: That's very welcomed.

4 ARBITRATOR VON KANN: Do we need to make
5 this an exhibit?

6 MR. JACOBY: Yes. Well, I was going to
7 suggest, with the panel's permission, to identify this
8 as -- the original document would be album purchaser
9 demographics, SD-3. And I would suggest that we mark
10 this as SD-3A so we could have them together in Mr.
11 Fine's testimony.

12 (Whereupon, Exhibit SD-3A was
13 marked for evidence)

14 CHAIRMAN VAN LOON: Any objection, Mr.
15 Garrett?

16 MR. GARRETT: I have no objection. I did
17 have a couple of questions, though. It wasn't clear
18 to me for what period of time this data represented.
19 The sound data has essentially two components for
20 servers. They have the monthly diary, and then they
21 also have a monthly questionnaire. I believe that the
22 diary data is used to show album purchases and

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1 demographics, and I just want to confirm that with Mr.
2 Jacoby.

3 MR. JACOBY: And I indicated to Mr.
4 Garrett that I didn't know the answer to that
5 question. I'm happy to find it out, and I'll
6 supplement my information response to Mr. Garrett as
7 to that information, as to exactly where it came from
8 and what time period.

9 I do know Mr. Fine told me -- and I can
10 represent to the panel -- these percentages don't
11 change over time. It's not like this six months is
12 vastly different than the preceding six months.

13 And, indeed, as Mr. Fine indicated in
14 representing his testimony, the percentages here on
15 the demographics likewise are quite close to the album
16 purchaser. He said it moves a little bit, gets a
17 little younger. And when you match up the numbers,
18 you'll see, in fact, that's precisely the case.

19 CHAIRMAN VAN LOON: Admitted.

20 (Whereupon, Exhibit SD-3A was
21 received for evidence)

22 MR. STEINTHAL: Should we talk about the

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1 timing issue first before we get into cross?

2 I think that if we break at 5, we'll have
3 a hard time finishing tomorrow. So what I would
4 propose is that we take a break at 5 or 5:30 for an
5 hour or so, or an hour-and-a-half. I'm willing to go
6 late. It's not a question of me not willing to go
7 late. I'm willing to go as late as everybody's
8 willing to go to give us the best shot.

9 I'm happy to go really late. What do you
10 want us to do? I hear a voice for Mr. Marks going
11 really late.

12 MR. GARRETT: Well, yeah. Let me just
13 make that point clear. I think that there comes a
14 time when his responses -- you reach a stone wall,
15 too, after being questioned all day long. So I don't
16 want this to turn on just Mr. Steinthal's convenience
17 here.

18 We would like to certainly achieve the
19 goal of finishing by the end of the day tomorrow, so
20 whatever is necessary. But we do have some concerns
21 about our own witness too.

22 CHAIRMAN VAN LOON: Okay. Well, why don't

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1 we do a further assessment around five-ish about how
2 things feel and how the witness is holding up, how
3 close to stumbling incoherence he's come, and we'll
4 figure out what we do at that point.

5 Thank you. Then please resume, Mr.
6 Steintal.

7 MR. GARRETT: Excuse me. Are we in open
8 session or closed session?

9 MR. STEINTAL: I've got one more or two
10 more questions in an area on public, and then we can
11 go in --

12 CHAIRMAN VAN LOON: Still in open session.

13 MR. STEINTAL: We're still in open
14 session.

15 Mr. Marks, I was puzzling over lunch over
16 your last set of answers relating to sound recordings
17 and musical works, when you said that sound recordings
18 and musical works are unique using Muzak as an
19 example. Do you remember saying that?

20 THE WITNESS: Yes.

21 BY MR. STEINTAL:

22 Q And I understand you to be saying that

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1 sound recordings and musical works are unique separate
2 rights licensed by different parties, correct?

3 A Yes.

4 Q And Muzak's traditional background music
5 service that you were referencing requires Muzak only
6 to get rights to musical works, correct, and not to
7 sound recordings?

8 A Yes.

9 Q So just to be clear, you can have a
10 valuable, viable music service that makes use of
11 musical works and musical work rights without use of
12 sound recordings and sound recording rights, correct?

13 A Muzak has their business without -- that's
14 their background music business as opposed to
15 foreground music business, without obtaining any
16 rights for the sound recordings.

17 Q And am I correct, then, that while you can
18 have a valuable business that makes reference and use
19 of musical works without sound recordings, it doesn't
20 work the other way around. You can't have a music
21 service that performs sound recordings without
22 performing the underlying musical works too; isn't

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1 that right?

2 A Generally, unless the musical works are in
3 the public domain, like classical music or something
4 like that.

5 ARBITRATOR VON KANN: Is the
6 foreground/background -- I think I know what you mean.
7 Muzak takes "My Way," and hires a band and makes --
8 that's background music.

9 THE WITNESS: Right.

10 ARBITRATOR VON KANN: But they get the
11 Frank Sinatra record, and that's foreground music?

12 THE WITNESS: Yes.

13 ARBITRATOR VON KANN: Okay.

14 MR. STEINTHAL: I think we need to go on
15 the restricted record now.

16 CHAIRMAN VAN LOON: Let's go into closed
17 session then, and continue.

18 (Whereupon, at 2:11 p.m., the proceedings
19 went into Closed Session.)

20

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NEAL R. GROSS

COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701

(202) 234-4433

www.nealrgross.com

CERTIFICATE

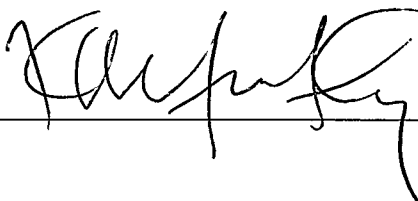
This is to certify that the foregoing transcript in
the matter of: Hearing: Digital Performance Right
 in Sound Recording and Ephemeral
 Recording,
 Docket No. 2000-9 CARP DTRA 1 & 2

Before: Library of Congress
 Copyright Arbitration Royalty Panel

Date: September 12, 2001

Place: Washington, DC

represents the full and complete proceedings of the
aforementioned matter, as reported and reduced to
typewriting.



SOUNDATA

Album Purchases - Demographics

AGE

12-15 10%
16-17 7%
18-20 9%
21-24 18%
25-34 27%
35-44 17%
45+ 12%

RACE

White.....76%
Black.....15%
Hispanic.....5%
Other.....4%

GENDER

Male.....56%
Female....44%

EDUCATION

H.S./Less....43%
Some College....19%
College Grad....38%

HOUSEHOLD INCOME

Under \$30,000....24%
\$30,000-\$50,000....33%
Over \$50,000.....43%

REGION

North East.....21%
North Central...31%
South.....25%
West.....23%

RESIDENCE

City.....51%
Suburb....29%
Rural.....20%

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These search terms have been highlighted: **corporate overview**



August 13, 2001

Company

Corporate Overview

Lomasoft, a full service IT consulting firm and value-added solution provider, has achieved a stellar reputation among our clients for offering solutions that allow systems and people to work in harmony. We recognize that systems do not operate alone; the people that operate the systems make the difference. Companies engaging Lomasoft benefit from our business process experience and technological know-how coupled with our understanding of the human element of business, to achieve the best possible solution. Lomasoft is recognized as a "unique service provider" among our competitors because we offer a focused, proactive approach to IT solution development and support for each of our clients. Our team of consultants is comprised of the most seasoned professionals the market has to offer. They possess a wealth of knowledge based on years of experience with business process as well as solution development as it pertains to our market segments. The combination of these attributes has lead to the development of a service offering that is unmatched by competition.

Lomasoft has been a results oriented company since it was founded. Our trademark has been consistently successful projects - that meet or exceed customer's expectations and enable them to achieve their business goals. We have enjoyed a reputation for consistent delivery, high hit rate, and high customer satisfaction during our eight years in business. We have earned this with our high quality team of project managers and consultants, and by an overall insistence on quality and results on all our projects. As the world has moved to the web and end users have developed an ever more unquenchable thirst for data, Lomasoft has leveraged its track record to act as a high quality, reliable partners to companies launching e-business solutions.

Keys in choosing Lomasoft:

- Our consistent track record mitigates customer risk.
- Our advanced capability enables us to develop complex enterprise solutions.

As a result, our customers achieve the shortest possible time to market and gain maximum advantage over competitors.

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